

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Arizona Minority Coalition for Fair  
Redistricting, et al.  
  
Plaintiffs,  
  
vs.  
  
Arizona Independent Redistricting  
Commission, et al.  
  
Defendants.

No. CIV-04-0797-PHX-ROS  
  
**AMENDED ORDER**

This Amended Order corrects typographical errors in the Court's previous Order entered on March 1, 2005. On May 26, 2004, the Court issued an Order ruling on various pending motions in this action and promising that a written opinion would follow. This is that opinion. Pending before the Court were Plaintiffs' Request to Convene a Three-Judge Court, Application for Order to Show Cause, and Application for a Preliminary Injunction. Also pending was Defendant Arizona Independent Redistricting Commission's Motion to Dismiss. Because this dispute centered around state constitutional issues and because Plaintiffs' federal claims had no merit, the Court granted the Motion to Dismiss and denied the remaining Motions.<sup>1</sup>

**BACKGROUND**

**I. Redistricting in Arizona**

In November 2000, Arizona voters approved Proposition 106, an Arizona ballot measure that amended the Arizona Constitution to establish the Arizona Independent

<sup>1</sup>The Court did not schedule a hearing on the Motions because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions and oral argument would not have aided the Court's decision. See Mahon v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999), modified, No. 97-17298, 1999 U.S. App. LEXIS 8016.

1 Redistricting Commission (the "IRC or the "Commission"). (First Am. Compl. ¶ 21 [Doc.  
2 #15].) Proposition 106 required the IRC to reapportion Arizona's legislative and  
3 congressional districts for the 2002 through 2010 elections according to specific redistricting  
4 criteria.<sup>2</sup> (Id. ¶ 22.)

5 The IRC held a series of public hearings in the summer of 2001 and in November  
6 2001 adopted a legislative redistricting plan for use in the 2002 legislative elections (the  
7 "2001 Legislative Plan"). (Id. ¶23.) The IRC submitted its new legislative plan to the  
8 Department of Justice ("DOJ") for preclearance on January 24, 2002.<sup>3</sup> (Id. ¶ 24.) A  
9 preclearance decision from the DOJ, however, was not immediately forthcoming. (See id.)  
10 Once the DOJ received the submission, it had 60 days in which to object to or preclear the  
11 plan. (Id. (citing 28 C.F.R. § 51.9(a) & (b).)

12 On March 2, 2002, the Arizona Minority Coalition for Fair Redistricting (the  
13 "Minority Coalition" or "Coalition") and several individual plaintiffs filed a complaint in  
14 Arizona state court alleging that the 2001 Legislative Plan violated the Arizona Constitution.  
15 (Id. ¶ 24.) In particular, the Minority Coalition alleged that the IRC failed to comply with  
16 its duty to create and maintain "competitive" districts. See Navajo Nation v. Arizona Indep.  
17 Redistricting Comm'n, 230 F.Supp.2d 998, 1002 (D. Ariz. 2002) (discussing Minority  
18 Coalition's state court suit).

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20 <sup>2</sup>The criteria include compliance with the United States Constitution and the Voting  
21 Rights Act and – to the extent practicable – equal population between districts, districts that  
22 reflect communities of interest, district lines that use visible geographic features and city  
23 boundaries, and "competitive districts . . . where to do so would create no significant  
24 detriment to the other goals." Ariz. Const. art. IV, pt. 2, §1(14)(A)-(F). For background on  
25 Proposition 106, see Rhonda L. Barnes, Comment, Redistricting in Arizona Under the  
Proposition 106 Provisions: Retrogression, Representation and Regret, 35 Ariz. St. L. J. 575  
(2003).

26 <sup>3</sup>Because Arizona has a history of discrimination, it is required to submit redistricting  
27 plans for preclearance to the DOJ or the District Court for the District of Columbia under §  
28 5 of the Voting Rights Act. See Arizona v. Reno, 887 F. Supp. 318, 319-20 (D.D.C. 1995);  
42 U.S.C. § 1973c; see also 28 C.F.R. § 51.10.

1 On May 1, 2002, because no time remained for a state court decision to affect the  
2 2002 legislative elections and because the DOJ had not yet rendered its preclearance decision  
3 concerning the 2001 Legislative Plan, the IRC filed a complaint in this Court seeking to  
4 enjoin the use of preexisting 1994 legislative districts and to order the implementation of a  
5 redistricting plan on an interim basis for the 2002 legislative elections. (First Am. Compl.  
6 ¶ 27.) After extensive hearings and testimony, this Court found that the 1994 districts were  
7 severely malapportioned, enjoined their use, and adopted an interim legislative plan for use  
8 in the 2002 elections. See Navajo Nation, 230 F.Supp.2d at 1007-1016.

9 During the summer of 2002, the IRC again met to revise the legislative districts for  
10 the 2004 through 2010 elections. (Id. ¶ 35.) The IRC finalized a new legislative plan on  
11 August 14, 2002 (the "2002 Legislative Plan" or "2002 Plan") and submitted it to the DOJ  
12 for preclearance. (Id.) The DOJ precleared the Plan on February 10, 2003. (Id.) The  
13 Minority Coalition, however, remained unsatisfied with the new districts. It amended its  
14 complaint in state court and alleged that the IRC again failed to create competitive districts.  
15 (Id. ¶ 36.)

16 The Arizona Superior Court set a trial date of July 8, 2003. (Id. ¶ 38.) On May 30,  
17 2003, however, the Commission removed the case to this Court and the trial was postponed.  
18 (Id.) This Court remanded the case to state court on September 5, 2003 for lack of federal  
19 jurisdiction. See Arizona Minority Coalition v. Arizona Indep. Redistricting Comm'n, 284  
20 F.Supp.2d 1240, 1249 (D. Ariz. 2003). After remand, the Arizona Superior Court set trial  
21 for November 2003. (First Am. Compl. ¶ 40.)

22 The trial in state court began on November 12, 2003 and continued for six weeks.  
23 (Id. ¶ 41.) On January 16, 2004, the court issued a written ruling: (1) declaring that the IRC's  
24 2002 Legislative Plan violated the state constitution by failing to create competitive districts,  
25 (2) enjoining the use of the 2002 Legislative Plan for the 2004 legislative elections, (3)  
26 ordering the IRC to reconvene and establish lawful legislative districts within 45 days, and  
27 (4) ordering the IRC to appear on March 5, 2004 with a new legislative map. (Id.)  
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1 From February through April 2004, the IRC met to create a new legislative district  
2 plan that complied with the state court's January 16, 2004 order. (Id. ¶ 43.) The Commission  
3 adopted many of the district configurations and Hispanic Voting Age percentage requests  
4 made by the Minority Coalition and retained a majority Native-American district. (Id. ¶ 45.)  
5 The IRC presented the new legislative plan to the Arizona Superior Court on March 5, 2004.  
6 (Id.) Both the Commission's experts and the Plaintiffs approved of the plan. (Id.)

7 To comply with the Arizona Constitution, the Superior Court ordered that the March  
8 2004 legislative redistricting plan be advertised for at least 30 days to allow the public to  
9 comment on the plan. (Id. ¶ 47 (citing ARIZ CONST., art IV, pt.2, § 1(16).) The  
10 Commission formally placed the plan on its website on March 8, 2004, along with a notice  
11 stating that the public had 30 days to comment. (Id.)

12 On April 2, 2004, the IRC amended the March 2004 legislative redistricting plan  
13 based on public comments received. (Id. ¶ 48.) The IRC finalized the plan on April 12, 2004  
14 (the "April 12 Legislative Plan" or "April 12 Plan"). (Id.) On April 15, 2004, the Arizona  
15 Superior Court held a hearing in the state court action to take testimony from the IRC in  
16 support of the April 12 Plan and to hear objections from other parties. (Id. ¶ 49.) The court  
17 concluded that the Plan complied with the Arizona and federal constitutions and ordered the  
18 IRC to submit it to the DOJ for preclearance and to seek expedited review. (Id. ¶ 50.)

19 The IRC submitted the April 12 Legislative Plan to the DOJ for preclearance on April  
20 20, 2004. (Id. ¶ 51.) Although the IRC requested expedited consideration, there was no  
21 guarantee that the DOJ would complete its review in time to meet critical election deadlines.  
22 The DOJ had 60 days to preclear or object to the April 12 Legislative Plan. See 28 C.F.R.  
23 §§ 59(a) & (b). If the submission was incomplete or if the DOJ required additional  
24 information, the 60-day clock would begin anew once the DOJ received the further  
25 information. Plaintiffs pointed out that if this were to occur, the preclearance deadline could  
26 extend beyond the August 5, 2004 early balloting date for the primary election. (First. Am.  
27 Compl. ¶ 72.)  
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1     **II.     This Litigation**

2             On April 23, 2004, the Minority Coalition and several other Plaintiffs<sup>4</sup> filed a Verified  
3     Complaint in this District seeking a preliminary and permanent injunction directing the IRC  
4     and the Arizona Secretary of State to conduct the 2004 legislative primary and general  
5     elections under the April 12 Legislative Plan or an alternative legislative redistricting plan  
6     that complies with the United States Constitution, the Voting Rights Act of 1965 (the  
7     "VRA"), and the Arizona Constitution on an emergency interim basis despite the lack of  
8     preclearance from the DOJ. (Verified Compl. at 13-14 [Doc. #1].)

9             The Coalition alleged that without a legislative plan ordered by this court, the 2004  
10    legislative primary and general elections would "at best be delayed and at worst cancelled."  
11    (Id. ¶ 58.) Arizona law has technical procedures that had to be completed before the primary  
12    and general elections.<sup>5</sup> To qualify for the primary election ballot, partisan legislative  
13    candidates had to file their nomination petitions no later than June 9, 2004. A.R.S. §§ 16-  
14    311, 16-314. The Arizona Secretary of State had to certify the names of all legislative  
15    candidates who have qualified for the ballot by June 10, 2004, including the number of the  
16    legislative districts for each candidate. (Verified Compl. ¶ 50.)

17            All matters pertaining to candidate qualification were required to be resolved before  
18    ballots could be printed. A.R.S. §§ 16-314, 16-351. Candidate qualification challenges had  
19    to be filed by June 23, 2004, and decided by the trial court by July 2, 2004. A.R.S. § 16-314,  
20    16-351. Appeals from the trial court decisions in election contests had to be filed no later  
21    than July 7, 2004, with a decision from the Arizona Supreme Court to be rendered promptly.  
22    Id. Federal law required that overseas military personnel be sent a list of qualified candidates  
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24            <sup>4</sup>The other Plaintiffs are Pima County Supervisor Ramon Valdez, State Senator Peter  
25    Rios, State Representative Steve Gallardo, Maricopa County Supervisor Mary Rose Garrido  
26    Wilcox, Carlos Avelar, James Sedillo, Esther Lumm, Virginia Rivera, Los Abogados, the  
27    Navajo Nation, and Leonard Gorman.

28            <sup>5</sup>Arizona's primary election is scheduled to occur on September 7, 2004. See A.R.S.  
§ 16-201.

1 at least 60 days before the election, which in this case meant a deadline of July 9, 2004 for  
2 the 2004 primary election. (Verified Compl. ¶ 51.) Precinct boundaries had to be established  
3 in conformity with the legislative districts, A.R.S. § 16-411, and any change in those  
4 boundaries also had to be precleared.

5 This case was originally assigned to the Hon. Mary H. Murguia. At a preliminary  
6 pretrial conference before Judge Murguia on Friday, April 30, 2004, the IRC indicated that  
7 it would be contesting federal jurisdiction. (See Tr. at 9 [Doc. #18].) DOJ representatives,  
8 present at the hearing by telephone, declined to specify when they would finish their review  
9 of the April 12 Legislative Plan and also indicated by a letter they had faxed earlier in the day  
10 that the Court had no jurisdiction to grant the Plaintiffs' requested relief. (Id. at 7-8.) In an  
11 attempt to gain a federal jurisdictional foothold, the Minority Coalition responded by filing  
12 a First Amended Complaint on Monday, May 3, 2004. [Doc. #15.] This First Amended  
13 Complaint raised equal protection, Voting Rights Act ("VRA"), and Fifteenth Amendment  
14 claims against the already-enjoined 1994 legislative districts. (Id. ¶¶ 57-60.) It also claimed  
15 that the 2002 Plan – enjoined by the Arizona Superior Court in January as unconstitutional  
16 under state law – violated § 2 of the VRA.<sup>6</sup> (Id. ¶¶ 61-65.)

17 On May 5, 2004, the Court granted the IRC's Motion to Transfer this case from Judge  
18 Murguia to this Court. [Doc. #16.] The IRC moved to dismiss on May 6, 2004. [Doc. #32.]  
19 About the same time, the IRC filed a motion in Arizona Superior Court asking the court to  
20 stay its injunction against the IRC's 2002 Legislative Plan in light of impending election  
21 deadlines, the IRC's appeal of the Superior Court's ruling, and the lack of any other  
22 enforceable plan. The IRC emphasized that the 2002 Legislative Plan had already been  
23 precleared by the DOJ. The trial court denied the motion – in part on the assumed  
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26 <sup>6</sup>Plaintiffs alleged that the IRC "added more than 5,000 additional voting age  
27 Hispanics to Legislative District 14 in the 2002 Legislative Plan, diluting the influence of  
28 Hispanic voters in another legislative district in violation of Section 2 of the Voting Rights  
Act of 1965." (Id. ¶ 64.)

availability of interim relief in this Court – and the IRC appealed that ruling to the Arizona Court of Appeals. (See Not. of Filing [Docs. ## 38 and 49.]

The Court of Appeals scheduled oral argument for May 27, 2004 on the IRC's request for a stay. This Court found it imperative to issue its ruling before that date, and on May 26, 2004 issued a short Order announcing its decision to grant the IRC's Motion to Dismiss and deny the Plaintiffs' Request to Convene a Three-Judge Court, Application for Order to Show Cause, and Application for a Preliminary Injunction. On Friday, May 28, 2004, the Arizona Court of Appeals stayed the Superior Court's injunction against the 2002 Legislative Plan and allowed the Plan's configured districts to be used in the 2004 elections.

## DISCUSSION

## I. Overview

Although Plaintiffs made a few pale attempts to raise federal questions in their Complaint and First Amended Complaint, this action at its core concerned only state constitutional concerns. Plaintiffs waged a long battle in Arizona state court to declare the IRC's 2002 Legislative Plan in violation of the state constitution. They succeeded in that battle, at least temporarily. The trial court found that the 2002 Plan failed to favor the creation of competitive districts and enjoined its use. The IRC then redrew its map and submitted it to the DOJ for preclearance as ordered.

But election deadlines were fast approaching, and the new map had to be precleared by the DOJ before it can be used. Concerned about the possibility that the DOJ might not render a preclearance decision in time, Plaintiffs rushed into federal court arguing emergency. Unless this Court ordered interim use of the new plan, Plaintiffs argued, Arizona would have no legally enforceable legislative map for the upcoming elections. At the same time, the IRC asked the trial court and then the Court of Appeals to stay the trial court's injunction against the 2002 Legislative Plan. That Plan was precleared by the DOJ in February 2003 and no § 5 barriers precluded its use.

1 As time went on and as the parties focused the issues in their briefs, it became clear  
2 to the Court that the only "emergency" was whether Plaintiffs could implement a plan that  
3 reflected their interpretation of the state constitution before the Arizona Court of Appeals or  
4 Supreme Court had sufficient time to act on the IRC's request for a stay. Arizona already had  
5 a federally precleared legislative plan (the 2002 Plan), and nothing barred its use except the  
6 Superior Court's state constitutional ruling. That ruling was on appeal in the state courts, and  
7 the IRC had in the meantime moved to stay the injunction. Reluctant to enter the thicket of  
8 this state constitutional dispute, the Court decided – as it should – to leave the question of  
9 which legislative map to use to the state courts.

10 Even more central to the Court's decision, however, was that this Court has no power  
11 to order the emergency interim use of the state court's non-precleared April 12 Plan – even  
12 in the face of the potential delay of the legislative elections. To the contrary, United States  
13 Supreme Court precedent makes clear that federal courts are barred from intervening in state  
14 apportionment matters in the absence of a violation of federal law and are actually obligated  
15 to enjoin the use of non-precleared plans in cases like this – i.e., where the federal court has  
16 not itself ordered the voting change. Plaintiffs raised no viable or cognizable federal claims  
17 here, and the delay of state legislative elections on state law grounds did not constitute  
18 grounds for this Court to circumvent the preclearance procedures established by § 5 of the  
19 VRA.

## 20 **II. The Request to Convene a Three-Judge Court**

21 Plaintiffs asked for an order convening a three-judge court pursuant to 28 U.S.C. §  
22 2284. Title 28 § 2284 provides: "A district court of three judges shall be convened when  
23 otherwise required by an Act of Congress, or when an action is filed challenging the  
24 constitutionality of the apportionment of congressional districts or the apportionment of any  
25 statewide legislative body." The first prerequisite has not been met; as for the second,  
26 Plaintiffs' constitutional challenges are wholly insubstantial. See Simkins v. Gressette, 631

1 F.2d 287, 295 (4th Cir. 1980) (noting that convening a three-judge court is not required to  
2 address insubstantial claims).

3 Plaintiffs argued that 42 U.S.C. § 1973c is an Act of Congress that requires the Court  
4 to convene a three-judge panel. First, as discussed more below, exclusive jurisdiction over  
5 actions brought under that statute lies in the United States District Court for the District of  
6 Columbia, and this Court has no authority to implement a non-precleared plan unless the plan  
7 was crafted by this Court in response to a federal violation. Second, § 1973 applies only in  
8 two instances: (1) where a plaintiff has brought an action to enjoin the use of an non-  
9 precleared voting change under § 5 of the Voting Rights Act, and (2) where a state  
10 redistricting body (in this case the IRC) brings an action for a declaratory judgment that a  
11 voting change complies with § 5. See 42 U.S.C. § 1943. The Minority Coalition did not  
12 seek to enjoin the April 12 Plan; rather, it sought to enforce it. Further, the IRC did not bring  
13 an action to preclear the Plan – it instead opted to submit the state court's April 12 Plan to the  
14 DOJ for administrative preclearance. See 42 U.S.C. § 1973c.

15 Thus, the only question for the Court under § 2284 was whether the Plaintiffs raised  
16 a substantial constitutional challenge to the apportionment of the state's legislative district.  
17 As discussed below, they did not. Plaintiffs' constitutional attack on the 1994 legislative  
18 districts failed for lack of an Article III case or controversy – this Court declared those  
19 districts unconstitutional long ago and neither the IRC nor the Secretary of State threatened  
20 to use them in the 2004 elections. Further, Plaintiffs' asserted Fifteenth Amendment  
21 challenge to the 2002 Plan fails to state a cognizable claim – the Supreme Court has never  
22 held nor suggested that vote dilution violates the Fifteenth Amendment. Finally, Plaintiffs'  
23 challenge the 2002 Plan under § 2 of the VRA is statutory, not constitutional, and does not  
24 require a three-judge court.

### 25 **III. Legal Standards Governing the Motions Before the Court**

26 A Rule 12(b)(6) motion to dismiss will be granted where the plaintiff fails to state a  
27 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of a Rule  
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1 12(b)(6) motion, "[r]eview is limited to the contents of the complaint," Clegg v. Cult  
2 Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994). The Court, however, may take  
3 judicial notice of matters of public record outside the pleadings. MGIC Indem. Corp. v.  
4 Weisman, 803 F.3d 500, 504 (9th cir. 1986). A complaint should not be dismissed "unless  
5 it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim  
6 which would entitle [her] to relief." Buckley v. County of Los Angeles, 968 F.2d 791, 794  
7 (9th Cir. 1992) (quotation omitted). To the extent, however, that "matters outside the  
8 pleadings [and public record] are presented to and not excluded by the court, the motion shall  
9 be treated as one for summary judgment." Fed. R. Civ. P. 12(b); Del Monte Dunes at  
10 Monterey, Ltd. v. Monterey, 920 F.2d 1496 (9th Cir. 1990).

11 A motion to dismiss under Rule 12(b)(1) "addresses the court's subject matter  
12 jurisdiction, derived from the case or controversy clause of Article III[.]" Biagro Western  
13 Sales, Inc. v. Helena Chem. Co., 160 F.Supp.2d 1136, 1141 (E.D. Cal. 2001). Federal courts  
14 are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377  
15 (1994). It is assumed that a cause lies outside this jurisdiction, and the burden of establishing  
16 the contrary rests on the party asserting jurisdiction. Id. A motion to dismiss for lack of  
17 subject matter jurisdiction may either attack the allegations of the complaint or may be made  
18 as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact."  
19 Thornhill Publ'n Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

20 When a motion to dismiss attacks the allegations of the complaint as insufficient to  
21 confer subject matter jurisdiction, all allegations of material fact are taken as true and  
22 construed in the light most favorable to the nonmoving party. Federation of African Amer.  
23 Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). When the motion is a  
24 factual attack on subject matter jurisdiction, a defendant may "rely on affidavits or any other  
25 evidence properly before the Court." St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.  
26 1989). "It then becomes necessary for the party opposing the motion to present affidavits or  
27 any other evidence necessary to satisfy its burden of establishing that the court, in fact,  
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1 possesses subject matter jurisdiction." Id. No presumptive truthfulness attaches to the  
2 plaintiff's allegations, and the existence of disputed material facts will not preclude the trial  
3 court from evaluating for itself the existence of jurisdiction. Thornhill, 594 F.2d at 733.

4 Finally, to establish entitlement to a preliminary injunction, a plaintiff must prove  
5 either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2)  
6 that serious questions going to the merits were raised and the balance of hardships tips  
7 sharply in its favor. See Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d  
8 914, 917-918. These two formulations "represent two points on a sliding scale in which the  
9 required degree of irreparable harm increases as the probability of success decreases." Hunt  
10 v. National Broad. Co., Inc., 872 F.2d 289, 293 (9th Cir. 1989) (quotes and citation omitted);  
11 Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003) (referring to two formulations as  
12 representing "a continuum of equitable discretion, whereby 'the greater the relative hardship  
13 to the moving party, the less probability of success must be shown'" (quoting National Ctr.  
14 for Immigration Rights, Inc. v. INS, 743 F.2d 1365, 1369 (9th Cir. 1984)).

#### 15 **IV. Preclearance and § 5 of the Voting Rights Act**

16 Plaintiffs asked the Court to adopt the state court's April 12 Plan on an emergency  
17 interim basis without preclearance. This the Court cannot do. Congress enacted the Voting  
18 Rights Act (the "VRA") in 1965 "to rid the country of racial discrimination in voting." South  
19 Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Faced with election practices in various  
20 states that effectively denied minorities the right to vote, Congress hoped through the VRA  
21 to end what it perceived as "an insidious and pervasive evil . . . perpetuated in certain parts  
22 of the country through unremitting and ingenious defiance of the Constitution." Id. Before  
23 the VRA, "Congress had enacted a series of statutes that aimed to eliminate, on a case-by-  
24 case basis, the problem of [voting discrimination]." United States v. State of Louisiana, 952  
25 F. Supp. 1151, 1157 (W.D. La. 1997) (citing Katzenbach, 383 U.S. at 313)). These efforts  
26 largely failed. "Litigation was slow, favorable court decrees were circumvented with new  
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1 practices that discriminated against racial minorities, and local officials outright defied court  
2 orders." Id. (citing Katzenbach, 383 U.S. at 314).

3 "Congress's frustrations with recalcitrant state and local officials found its most potent  
4 expression in § 5 of the VRA." State of Louisiana, 952 F.Supp. at 1157. Section 5 of the Act  
5 was "a response to the common practice in some jurisdictions of staying one step ahead of  
6 the federal courts by passing new discriminatory voting laws as soon as the old ones had been  
7 struck down." Beer v. United States, 425 U.S. 130, 140 (1976). By "freezing election  
8 procedures in the covered areas unless the changes can be shown to be nondiscriminatory,"  
9 Beer, 425 U.S. at 140 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 58 (1975)),  
10 Congress intended to ensure that gains in minority political participation were not eroded  
11 through the new discriminatory procedures and techniques. See Beer, 425 U.S. at 140-41;  
12 H.R. Rep. No. 196 at 57-58. Under § 5, a covered jurisdiction must prove that any change  
13 in voting practices or procedures does not have the purpose and will not have the effect of  
14 denying or abridging the right to vote on account of race or color before it may implement  
15 that change.<sup>7</sup> See 42 U.S.C. § 1973c; Katzenbach, 383 U.S. at 335.

16 The State of Arizona is a covered jurisdiction under the Voting Rights Act. 42 U.S.C.  
17 § 1973b(b). "A covered jurisdiction has two avenues available to seek the federal  
18 preclearance required under § 5." Lopez v. Monterey County, 525 U.S. 266, 270 (1999)  
19 ("Lopez II"). "The jurisdiction may submit the proposed voting change to the Attorney  
20 General." Id. "If the Attorney General affirmatively approves the change or fails to object  
21 to it within 60 days, the change is deemed precleared and the jurisdiction may put it into  
22 effect." Id. Otherwise, "either in the first instance or following an objection from the  
23 Attorney General, a covered jurisdiction may seek preclearance for a voting change by filing  
24 a declaratory judgment action in the United States District Court for the District of  
25 Columbia." Id. The change is precleared "if the court declares that the proposed

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27 <sup>7</sup>Because § 5 focuses on "freez[ing] election procedures," a plan has an "impermissible  
28 effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities  
with respect to their effective exercise of the electoral franchise." Beer, 425 U.S. at 141.

1 'qualification, prerequisite, standard, practice, or procedure does not have the purpose and  
2 will not have the effect of denying or abridging the right to vote on account of race or color,  
3 or in contravention of the guarantees set forth in section 1973b(f)(2) [proscribing voting  
4 restrictions based on membership in a language minority group]." Id. at 270-71 (quoting 42  
5 U.S.C. § 1973c)). If a voting change subject to § 5 has not been precleared, § 5 plaintiffs  
6 are entitled to an injunction prohibiting implementation of the change. Clark v. Roemer, 500  
7 U.S. 646, 652-53 (1991) (citing Allen v. State Bd. of Election, 393 U.S. 544, 572 (1969)).

8        Fearful that the state court's April 12 Plan might not be precleared by the DOJ in time  
9 to meet critical election deadlines, Plaintiffs asked this Court to take immediate action and  
10 order that Plan into effect on an interim basis without preclearance. They argued that the  
11 2004 legislative elections would be delayed and possibly cancelled unless this Court acted.  
12 The potential delay of a state legislative election is a serious issue, but "do[es] not . . . change  
13 the basic nature of the § 5 preclearance process." Lopez v. Monterey County, 519 U.S. 9, 23  
14 (1996) ("Lopez I"). "Congress designed the preclearance procedure 'to forestall the danger  
15 that local decisions to modify voting practices will impair minority access to the electoral  
16 process'" Id. (quoting McDaniel v. Sanchez, 452 U.S. 130, 149 (1981)). It "chose to  
17 accomplish this purpose by giving exclusive authority to pass on the discriminatory effect of  
18 purpose of an election change to the Attorney General and to the District Court for the  
19 District of Columbia." Id. "Because a large number of voting changes must necessarily  
20 undergo the preclearance process, centralized review enhances the likelihood that recurring  
21 problems will be resolved in a consistent and expeditious way." McDaniel, 452 U.S. at 151.

22        The Supreme Court has on two occasions reversed lower federal courts for doing  
23 exactly what Plaintiffs urged this Court to do – allow elections to proceed under non-  
24 precleared state-crafted plans. In Clark v. Roemer, 500 U.S. at 652-53, Louisiana failed to  
25 submit for preclearance a number of statutory and constitutional voting changes concerning  
26 the election of state judges, many of which were adopted in the late 1960s and 1970s. The  
27 appellants sought to enjoin Louisiana's 1990 judicial elections because of the lack of  
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1 preclearance for those changes. The district court nonetheless permitted the elections to go  
2 forward in the absence of preclearance, citing the short time between election day and the  
3 latest request for an injunction, the fact that qualifying and absentee voting had begun, and  
4 the time and expense of the candidates. On appeal, the Supreme Court reversed, holding that  
5 the court erred by not enjoining the elections. "A [state-crafted] voting change in a covered  
6 jurisdiction," the Court warned, "'will not be effective as law until and unless cleared.'" Clark, 500 U.S. at 652 (quoting Connor v. Walker, 421 U.S. 656, 656 (1975)).

8       The Court reaffirmed this principle five years later in Lopez I, 519 U.S. at 20-25. The  
9 facts of that case are relatively complicated and for our purposes here do not warrant a  
10 lengthy explanation. The short version is that the appellee Monterey County had enacted a  
11 series of ordinances between 1972 and 1983 consolidating its judicial districts into a single  
12 countywide municipal court. Like the State of Louisiana in Clark, it failed to submit those  
13 changes for preclearance to either the Attorney General or the District Court for the District  
14 of Columbia. After years of legal wrangling and faced with the prospect of having no  
15 judicial elections, a three-judge panel in the District Court for the Northern District of  
16 California eventually approved the use of the County's consolidation plan and ordered at-  
17 large countywide elections. The Supreme Court, comparing the case to Clark, held that it  
18 was "error for the [d]istrict court to order elections under that system before it had been  
19 precleared by either the Attorney General or the United States District Court for the District  
20 of Columbia." Lopez I, 519 U.S. at 24.

21       If this Court were to order the interim use of the state court's legislative plan pending  
22 preclearance, it would commit exactly the same error committed by the district courts in  
23 Clark and Lopez I. The "congressional choice in favor of specialized review" in the  
24 Department of Justice and District Court for the District of Columbia "necessarily constrains  
25 the role of the . . . district court." Id. "What is foreclosed to such district court is what  
26 Congress expressly reserved for consideration by the District Court for the District of  
27 Columbia or the Attorney General – the determination whether a covered change does or  
28

1 does not have the purpose or effect 'of denying or abridging the right to vote on account of  
2 race or color.'" Perkins .v Matthews, 400 U.S. 379, 385 (1971) (quoting 42 U.S.C. § 1973).  
3 When confronted with a non-precleared state-crafted plan, "[t]he . . . district court may  
4 determine only whether § 5 covers a contested change, whether § 5's approval requirements  
5 were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is  
6 appropriate." Lopez I, 519 U.S. at 24. Once a jurisdiction has submitted its plan to either  
7 the DOJ or the District of Columbia, "§ 5 provides no further remedy." Id.

8 Plaintiffs allude to an emergency exception to § 5's preclearance requirement. This  
9 exception – to the extent one may even call it that – finds its genesis in the Supreme Court's  
10 decision in Clark. In Clark, the Court left open the question of whether a district court may  
11 ever deny a § 5 plaintiff's motion for an injunction and allow a covered jurisdiction to  
12 conduct an election under a non-precleared state-crafted plan. The Court suggested that "[a]n  
13 extreme circumstance might be present if a seat's unprecleared status is not drawn to the  
14 attention of the [covered jurisdiction] until the eve of the election and there are equitable  
15 principles that justify allowing the election to proceed." Clark, 500 U.S. at 654-55. The  
16 Court found no such exigent circumstances in Clark, even though qualifying and absentee  
17 voting had begun under the non-precleared plan. Id. And it found no emergency in Lopez  
18 I, though the County and appellants "seem[ed] unable to fashion an election plan" and  
19 "enjoining the elections would leave the County without a judicial election system." Lopez  
20 I, 519 U.S. at 22. The situation here was much less dire – the IRC submitted the state court's  
21 plan to the DOJ on April 20 and while some election deadlines were approaching, the  
22 election was months away. The fact that the legislative election could have been delayed if  
23 the DOJ did not expedite does not in light of the facts of Clark and Lopez justify an end-run  
24 around the preclearance requirement.<sup>8</sup>

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25  
26 <sup>8</sup>The preclearance requirement is more than just a procedural technicality – it serves  
27 to protect minority voters from both subtle and overt discrimination. See Beer, 425 U.S. at  
28 140. Even if the Court had concluded that it had jurisdiction to adopt the April 12 Plan, it  
would not lightly assume that the Plan meets § 5's requirements. Although the Minority

1 Perhaps recognizing that their efforts to persuade this Court to implement the state  
2 court's April 12 Plan without preclearance were unlikely to succeed, Plaintiffs urged a  
3 possible alternative in their preliminary injunction papers. They argued that the Court should  
4 draw and implement a new legislative map in the event it found that it could not approve the  
5 use of the April 12 Plan. Undoubtedly animating Plaintiffs' proposal was the fact that the  
6 Supreme Court has carved an exception to preclearance in certain cases involving federally  
7 court-ordered voting changes. "As a general rule, voting changes crafted wholly by a federal  
8 district court in the first instance do not require preclearance." Lopez II, 525 U.S. at 704-05  
9 (citing Connor v. Johnson, 402 U.S. 690, 691 (1971)). This principle stems from separation-  
10 of-powers concerns. Id. at 705. As Justice Black observed in Connor, "Under our  
11 constitutional system it would be strange indeed to construe § 5 to require that actions of a  
12 federal court be stayed and reviewed by the Attorney General or the United States District  
13 Court for the District of Columbia." Connor, 402 U.S. at 695.

14 But Connor's preclearance exception has its limits. Federal courts have the power to  
15 redistrict only in the face of threatened violations of federal law. See Voinovich v. Quilter,  
16 507 U.S. 146, 156 (1993) ("Federal courts are barred from intervening in state  
17 apportionment matters in the absence of a violation of federal law . . ."). It is against this  
18 backdrop that Connor carved out its preclearance exception. See McDaniel v. Sanchez, 452  
19 U.S. 130, 131 (1981) ("[The] preclearance requirement does not apply to plans prepared and  
20 adopted by a federal court to remedy a constitutional violation."). As explained in Sections  
21 V-VII below, Plaintiffs have not alleged any substantial federal claims; rather, they attempt

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22  
23 Coalition claimed that the Plan protects the interests of Latinos and other minorities, the  
24 Mexican American Legal Defense and Education Fund ("MALDEF") weighed against the  
25 April 12 Plan because that plan allegedly "reduces the Latino voting age population in every  
26 Latino majority legislative district in Arizona." (5/6/04 letter from MALDEF to DOJ,  
27 attached as Exh. 2 to Arizonan's for Fair and Legal Redistricting's Joinder in Mot. to Dismiss  
28 [Doc. #35].). It is interesting to note that in Navajo Nation, 230 F.Supp.2d. at 1004, the  
Minority took a diametrically opposite approach to preclearance – it argued that this Court  
could not give deference to the IRC's 2001 Legislative Plan because that Plan had not yet  
been precleared by the DOJ.

1 to convert Connor's limited preclearance exception into a broad-ranging emergency power.  
2 Plaintiffs cite no authority, however, for the proposition that federal law creates a right to  
3 have local elections conducted on the timetables prescribed by state law. The fact that  
4 Plaintiffs may suffer harm within the meaning of Fed. R. Civ. P. 65 does not by itself confer  
5 federal jurisdiction. Cf. Skelly Oil v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950)  
6 (Declaratory Judgement Act creates federal remedy but is not itself a basis for federal  
7 jurisdiction).

8 The only case cited by Plaintiffs that merits separate comment is Clark v. Smith, 189  
9 F.Supp.2d 503 (S.D. Miss. 2002). After the 2000 census, Mississippi lost a seat in the United  
10 States House of Representatives. Id. at 505. The Mississippi Legislature attempted to  
11 reapportion the state's congressional districts, but was unsuccessful. Id. In October 2001,  
12 a group of voters filed an action in state court seeking an injunction directing the adoption  
13 and implementation of a redistricting plan. Id. One month later, another group filed an  
14 action in federal court seeking the same relief. Id. They alleged that the previous districts  
15 were unenforceable and that any state-crafted plan could not be enforced until it had been  
16 precleared. Id. The district court found it necessary to devise and implement its own plan  
17 to ensure that Mississippi had an enforceable redistricting plan in place before the elections.  
18 But Clark, unlike this case, involved a valid constitutional challenge to malapportioned  
19 districts. It also involved a congressional election. Article I, § 4 of the U.S. Constitution  
20 allows states to regulate the manner of choosing Senators and Representatives, but subjects  
21 the states to federal oversight.<sup>9</sup> The Clark plaintiffs thus presented a stronger case for federal  
22 court intervention than the Plaintiffs do here.

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25 <sup>9</sup>Article I, § 4 provides that "[t]he Times, Places, and Manner of holding Elections for  
26 Senators and Representatives, shall be prescribed in each State by the Legislature thereof."  
27 U.S. Const. art I, § 4, cl. 1. But the rest of that clause suggests that federal interests may  
28 trump state interests: "but the Congress may at any time by law make or alter such  
regulations, except as to the place of choosing Senators." Id.

1 Even if Plaintiffs' emergency argument had some merit, that argument was weakened  
2 and later eviscerated by the fact that the Defendants moved the Arizona Court of Appeals to  
3 stay the trial court's injunction against the 2002 Plan. The 2002 Plan had already been  
4 precleared by the DOJ. The Superior Court enjoined it on state constitutional grounds in  
5 January 2004, but the Defendants appealed the decision and later moved to stay the  
6 injunction. The Arizona Court of Appeals determined that the public interest in having a  
7 timely election outweighed the state constitutional concerns identified by Plaintiffs and  
8 granted stay relief on Friday, May 28, 2004. Even if this Court had decided that it had the  
9 power to adopt the Superior Court's April 12 Plan or to craft its own interim plan, deferral  
10 to the state court proceedings would have been warranted. Redistricting is "primarily the  
11 duty and responsibility of the State through its legislature or other body, rather than a federal  
12 court." Chapman v. Meier, 420 U.S. 1, 27 (1975). "Absent evidence that these state  
13 branches will fail timely to perform that duty, a federal court must neither affirmatively  
14 obstruct state reapportionment nor permit federal litigation to be used to impede it." Grove  
15 v. Emison, 507 U.S. 25, 34 (1993).

16 Federal courts have long been reluctant to intrude on state domestic policy. See,  
17 e.g., Pennsylvania v. Williams, 294 U.S. 176, 185 (1935) ("It is in the public interest that  
18 federal courts of equity should exercise their discretionary power with proper regard for the  
19 rightful independence of state governments in carrying out their domestic policy."). This  
20 litigation – stripped of Plaintiffs' obfuscation and deflection of the issues – centered entirely  
21 around state constitutional concerns. Although Plaintiffs alleged emergency, the only true  
22 crisis was whether they could implement a legislative redistricting plan that reflected their  
23 interpretation of state constitution before the Arizona Court of Appeals could act on the  
24 Defendants' request for a stay. This Court is not de facto state appellate body – and even if  
25 it concluded that it had jurisdiction to act – principles of federalism and comity would have  
26 counseled restraint.

1     **V.     The Challenges to the 1994 Legislative Districts**

2             At the status hearing before Judge Murguia on Friday, April 30, 2004, the IRC made  
3 no secret of the fact that it would be contesting federal jurisdiction. Ostensibly in hopes of  
4 finding a basis for federal jurisdiction before the IRC moved to dismiss, Plaintiffs amended  
5 their Verified Complaint over the weekend and raised a host of new federal claims. The first  
6 group of new claims involved Fourteenth Amendment, Voting Rights Act, and Fifteenth  
7 Amendment challenges to Arizona's 1994 legislative districts. Those challenges fail as a  
8 basis for federal jurisdiction because this Court declared those districts unconstitutional over  
9 two years ago and no Article III case or controversy exists with respect to their use.

10            The 2000 decennial census indicated that Arizona's population had increased by 64%  
11 – up from 3,665,226 in 1990 to 5,130,632 in 2000; it also showed substantial population  
12 shifts within the preexisting 1994 legislative districts. Navajo Nation, 230 F.Supp.2d at  
13 1002. The Equal Protection Clause of the Fourteenth Amendment requires states to  
14 apportion their legislative districts on an roughly equal population basis. Reynolds v. Sims,  
15 377 U.S. 533 (1964). Thus, when the State of Arizona failed to redistrict in time for the 2002  
16 legislative elections, the plaintiffs and intervenors in Navajo Nation filed suit in federal court  
17 seeking an injunction prohibiting the use of the '94 districts on Fourteenth Amendment  
18 grounds. This Court declared those districts unconstitutional in an order dated May 28, 2002  
19 and enjoined the Secretary of State from using them in the 2002 elections.

20            Article III of the U.S. Constitution places substantial limits on federal jurisdiction.  
21 The doctrines of standing and ripeness – derived from Article III – "ensure that an adequate  
22 factual and legal context will sharpen and cabin judicial-decision making" and "safeguard  
23 democracy by constraining the authority of an unelected judiciary to pass judgment on the  
24 acts of legislatures." Thomas v. Anchorage Equal Rights Comm'n., 220 F.3d 1134, 1143 (9th  
25 Cir. 2003) (O'Scannlain, J., concurring). "Whether the question is viewed as one of standing  
26 or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a  
27 constitutional case or controversy, that the issues presented are definite and concrete, not  
28

1 hypothetical or abstract." Id. at 1139 (quotation omitted). "In assuring that this jurisdictional  
2 prerequisite is satisfied, we consider whether the plaintiffs face 'a realistic danger of  
3 sustaining a direct injury'" or "whether the alleged injury is too 'imaginary' or 'speculative'  
4 to support jurisdiction." Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S.  
5 289, 298 (1979)).

6 Any claims concerning the 1994 legislative districts were too imaginary and  
7 speculative to support jurisdiction. Plaintiffs faced no actual or imminent threat of injury  
8 with respect to those districts. Neither the IRC nor the Secretary of State threatened to use  
9 them in the 2004 elections. And with good reason: those districts have already been declared  
10 unconstitutional. If the Defendants had threatened to use the '94 districts, res judicata would  
11 have applied in Plaintiffs' favor and an injunction would have been granted.<sup>10</sup> But they did  
12 not, and Plaintiffs' challenges to the 1994 districts were no more concrete than a challenge  
13 to the 1984 or 1974 districts. "Our role is neither to issue advisory opinions nor to declare  
14 rights in hypothetical cases, but to adjudicate live cases and controversies consistent with the  
15

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16  
17 <sup>10</sup>"Res judicata, or claim preclusion, treats a judgment, once rendered, as the full  
18 measure of relief to be accorded between the parties on the same claim or cause of action."  
19 Hydranautics v. Filmtec Corp., 204 F.3d 880, 888 (9th Cir. 2000) (internal quotations  
20 omitted). When a federal judgment is at issue, claim preclusion "applies where (1) the same  
21 parties, or their privies, were involved in [a] prior [federal] litigation, (2) the prior litigation  
22 involved the same claim as the later suit, and (3) the prior litigation was terminated by a final  
23 judgment on the merits." Gospel Missions of Am. v. City of Los Angeles, 328 F.3d 548, 555  
24 (9th Cir. 2003). The parties to this litigation were parties to Navajo Nation, Plaintiffs raised  
25 a Fourteenth Amendment claim in Navajo Nation, and that claim was terminated by a final  
26 judgment on the merits. Claim preclusion would thus apply in Plaintiffs' favor if Defendants  
27 threatened to use the 1994 districts. It also serves as another reason to deny Plaintiffs' claims:  
28 Plaintiffs have already been accorded relief on their Fourteenth Amendment claim and the  
rest of their challenges to the '94 districts are moot. While the Court recalls that the parties  
stipulated amongst themselves not to raise res judicata as a means of barring future  
proceedings challenging the '94 districts, the res judicata effect of the Court's judgment in  
Navajo Nation is a matter for this Court, not the parties. The Court cannot be controlled by  
an agreement of counsel on a question of law. Swift & Co. v. Hocking Valley Ry., 243 U.S.  
281, 289 (1917).

1 powers granted the judiciary in Article III of the Constitution." Id. at 1138. No case or  
2 controversy exists over the '94 districts.

### 3 **VI. The Voting Rights Act Challenge to the 2002 Legislative Plan**

4 As part of their efforts to remain in federal court, Plaintiffs also raised a Voting Rights  
5 Act claim against the IRC's 2002 Legislative Plan in their First Amended Complaint. They  
6 sought a preliminary and permanent injunction prohibiting the Secretary of State from using  
7 that Plan in the 2004 elections.<sup>11</sup> (First. Am. Compl. ¶ 61.) Using this Court's Navajo  
8 Nation plan as a benchmark, Plaintiffs alleged that the 2002 Plan adds more than 5,000  
9 voting age Hispanics to Legislative District 14. (Id. ¶ 64.) This increase, they asserted,  
10 raises the Hispanic voting age population in District 14 from 55.18% to 58.11% and  
11 "dilute[s] the influence of Hispanic voters in another legislative district [under § 2 of the  
12 VRA]."<sup>12</sup> (Id. ¶ 4 (emphasis added).)

13 Section 2(a) of the VRA prohibits any "voting qualification or prerequisite to voting  
14 or standard, practice, or procedure . . . [that] results in a denial or abridgement of the right  
15 of any citizen to vote on account of race or color [or membership in a language minority  
16 group.]" 42 U.S.C. § 1973(a) (incorporating § 1973(b)(f)(2)). "The essence of a § 2 claim  
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18 <sup>11</sup>At least, they appeared to seek an injunction. It is difficult to identify precisely what  
19 Plaintiffs wanted, because their theories and requests for relief changed from minute to  
20 minute. The First Amended Complaint appeared to ask the Court to enjoin the 2002 Plan.  
21 But in their Response to the IRC's Motion to Dismiss, Plaintiffs asserted: "[We] do not ask  
22 this Court to strike down any redistricting plan as unlawful. Rather, Plaintiffs' claims are  
23 directed at the absence of a redistricting plan . . . We invoke Section 2 in this Court not as  
24 a further means of enjoining [the 2002 Plan], but rather for the limited purpose of ensuring  
25 that the 2002 Legislative Plan is not implemented by this Court on an emergency interim  
26 basis for use in the 2004 elections[.]" (Pls.' Resp. to Def. IRC's Mot. to Dismiss at 8, 13-14  
27 [Doc. #36]) (emphasis in original). If Plaintiff indeed invoked the Voting Rights Act as a  
28 defense, then this is not a basis for federal jurisdiction. Franchise Tax Bd. v. Constr. Labors Vacation Trusts, 463  
U.S. 1, 10 (1983). The same analysis applies to Plaintiffs' challenges to the '94 districts.

<sup>12</sup>Plaintiffs do not identify that other district, nor do they identify what the Hispanic  
voting age population is in that district.

1 is that certain electoral law, practice, or structure interacts with social and historical  
2 conditions to cause an inequality in the opportunities enjoyed by [minority voters] to elect  
3 their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Section 2  
4 "is thus violated by vote dilution" – "the practice of reducing the potential effectiveness of  
5 a group's voting strength by limiting its opportunity to translate that voting strength into  
6 political power." Bruce M. Clark & Robert Timothy Reagan, Redistricting Litigation: An  
7 Overview of Legal, Statistical, and Case Management Issues 3 (Fed. Jud. Ctr. 2002) (citing  
8 Gingles, 478 U.S. at 46-51 and Shaw v. Reno, 509 U.S. 630, 641 (1993)).

9 In Gingles, 478 U.S. at 50-51, which involved a challenge to multimember districts,  
10 the Supreme Court held that § 2 will not ordinarily be violated unless three preconditions are  
11 met.<sup>13</sup> "First, the minority group . . . must be sufficiently large and geographically compact  
12 to constitute a majority in a single-member district." Id. at 50. "Second, the minority group  
13 must be . . . politically cohesive." Id. at 51. And third, the majority must vote "sufficiently  
14 as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Id. These  
15 three factors are necessary but not sufficient to establish a § 2 violation. See Johnson v.  
16 DeGrandy, 512 U.S. 997, 1011 (1994); see also Uno v. City of Holyoke, 72 F.3d 973, 980  
17 (1st Cir. 1995) (Gingles preconditions do not end case but raise a presumption of a violation).  
18 The statute itself requires plaintiffs to prove denial or abridgement of the right to vote "based  
19 on the totality of the circumstances."<sup>14</sup> See 42 U.S.C. § 1973(b).

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21 <sup>13</sup>Although Gingles construed § 2 in the context of a challenge to multimember  
22 districts, the Supreme Court has held that its three-part test applies in some form to vote  
23 dilution claims directed against single member districts. See, e.g., Grove, 507 U.S. at 40-41  
24 (applying third precondition); Voinovich, 507 U.S. at 148 (1993) (applying second  
precondition).

25 <sup>14</sup>The Gingles Court listed as relevant to the statute's totality-of-circumstances test the  
26 factors set forth in the Senate report on the 1982 amendment to § 2. Gingles, 478 U.S. at 44-  
27 45. The Senate report includes such factors as the extent of any history of official  
28 discrimination in the state or subdivision affecting the right to vote, whether political  
campaigns have been characterized by overt or subtle racial appeals, and the extent to which  
members of the minority group have been elected to public office in the jurisdiction. S. Rep.

1       The first Gingles precondition is of particular importance here. In Gingles, "the  
2 plaintiffs alleged and attempted to prove that their ability to elect the representatives of their  
3 choice was impaired by the selection of a multimember electoral structure." Gingles, 478  
4 U.S. at 46 (emphasis in original). The Court found, at least in the context of a challenge to  
5 multimember districts, that the minority group must demonstrate that its population is  
6 sufficiently large and geographically compact to constitute a majority in a single-member  
7 district. Id. at 50. But the Court declined "to consider whether section 2 permits, and if it  
8 does, what standards should pertain to, a claim brought by a minority group, that is not  
9 sufficiently large and compact to constitute a majority in a single-member district, alleging  
10 that the use of a multimember district impairs its ability to influence elections." Id. at 46  
11 (emphasis in original). Since Gingles, the Court has three times refused to reach the issue  
12 of whether a minority group may bring a vote dilution claim when it constitutes less than a  
13 majority of voters in a proposed district. See Johnson, 512 U.S. at 1008-09; Voinovich, 507  
14 U.S. at 158; Grove, 507 U.S. at 41 n.5.

15       Lower federal courts, however, have had the opportunity to address at least three types  
16 of cases where a minority group does not constitute a majority of voters in a proposed  
17 district: (i) "coalition" districts, (ii) "crossover" districts, and (iii) "influence-dilution" or  
18 "influence" districts. A coalition district is one in which two separate minority groups allege  
19 that a district could be formed in which they could join forces to elect a representative.  
20 See DeGrandy, 512 U.S. at 1020 (describing such districts). "A 'crossover' district is one  
21 where members of the minority group are not a majority of the relevant voting population but  
22 nonetheless have the ability to elect representatives of their choice with support from a  
23 limited but reliable white crossover vote." Rodriguez v. Pataki, 308 F.Supp.2d 346, 375-76  
24 (citing Hall v. Virginia, 276 F.Supp.2d 528, 533-34 & nn. 7-10 (E.D. Va. 2003)). Coalition  
25 and crossover districts "are also referred to as 'performance' districts, 'effective' districts, or  
26 'ability to elect' districts." Id. "An 'influence district,' by contrast, "is where minority voters

27 \_\_\_\_\_  
28 No. 97-417, at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

1 may not be able to elect a candidate of their choice but can play a substantial, although not  
2 decisive role in the electoral process." Id. (citing Georgia v. Ashcroft, 539 U.S. 461, 123  
3 S.Ct. 2498, 2512 (2003)).

4 Some courts have been willing to extend Gingles' first precondition to coalition and  
5 crossover districts. In Campos v. Baytown, 840 F.2d 1240, 1244 (1988), the Fifth Circuit  
6 permitted African-Americans and Hispanics to be combined for the purposes of complying  
7 with the first Gingles precondition, so long as the groups could show that they were  
8 politically cohesive. "There is nothing in the law," the court said, "that prevents the plaintiffs  
9 from identifying the protected aggrieved minority to include both Blacks and Hispanics."  
10 The Eleventh Circuit expressed the same opinion in Concerned Citizens v. Hardee County  
11 Bd., 906 F.2d 524, 526-27 (1990): "Two minority groups . . . may be a single section 2  
12 minority if they can establish that they behave in a politically cohesive manner." The Second  
13 Circuit has also allowed aggregation. See Bridgeport Coalition for Fair Representation v.  
14 City of Bridgeport, 26 F.3d 271, 276 (2d Cir.), vacated and remanded on other grounds, 512  
15 U.S. 1283 (1994) (combining African-Americans and Hispanics for purposes of satisfying  
16 first Gingles requirement). But see Nixon v. Kent County, 76 F.3d 1381, 1390-92 (6th cir.  
17 1996) (en banc) (holding that "[t]he language of the [VRA] does not support the conclusion  
18 that coalition suits are part of Congress' remedial purpose").

19 Similarly, in Metts v. Murphy, 347 F.3d 346, 2003 WL 22434637, at \*6 (1st Cir. Oct  
20 28, 2003) ("Metts I"), the First Circuit held that "whatever the status of other influence  
21 claims, at least crossover claims are cognizable under the VRA." The court cautioned that  
22 Gingles' first precondition "should not be read without regard to its function: to determine  
23 whether 'the ability of minority voters to elect representatives of their choice' is impeded."  
24 Id. (citing Gingles, 478 U.S. at 48). In the First Circuit's view, "[r]equiring the protected  
25 class to show that it is an absolute majority [would] ignore[] the reality that the class could  
26 elect its preferred candidate without such numbers" and "contravene[] the plain text of § 2,

1 which requires courts to consider the 'totality of the circumstances.'"<sup>15</sup> Id.; see also, Pamela  
2 S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote  
3 Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173, 202 (1989) ("To the extent that courts  
4 have read Gingles to elevate the ability to create a district with a majority-black electorate  
5 into a threshold requirement for establishing liability in all vote dilution litigation, they have  
6 improperly applied one particular theory of liability to other distinct types of vote dilution.");  
7 Martinez v. Bush, 234 F.Supp.2d 1275, 1320 n.56, 1320-23 (S.D. Fla. 2002) (doubting that  
8 first Gingles factor was intended to be a "literal, mathematical requirement"). But see  
9 Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 851-53 (5th Cir. 1999) (calling  
10 Gingles factors "a bright line test"); Negron v. City of Miami Beach, 113 F.3d 1563, 1569  
11 (11th Cir. 1997) (indicating same).

12 The vast majority of courts, however, have rejected pure influence-dilution claims:  
13 i.e., § 2 claims directed to districts where a minority group is unable to elect a candidate of  
14 its choice even with coalition or crossover support.<sup>16</sup> See, e.g., Cousin v. Sundquist, 145  
15 F.3d 818, 828 (6th Cir. 1998) (holding that § 2 violations cannot "consist of an impairment  
16 of the minority's ability to influence the outcome of the election rather than determine it");  
17 McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) ("[W]e cannot consider  
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19 <sup>15</sup>Metts I was vacated on rehearing en banc, but the en banc court essentially affirmed  
20 its holding, stating: "We are thus unwilling at the complaint stage to foreclose the possibility  
21 that a section 2 claim can ever be made out where the African-American population of a  
22 single member district is reduced in redistricting legislation from 26 to 21 percent" Metts  
v. Murphy, 363 F.3d 8, 12 (1st Cir. 2004) ("Metts II") (emphasis in original).

23 <sup>16</sup>The Ninth Circuit has never decided whether influence (or even coalition or  
24 crossover) claims are cognizable, but it affirmed a district court's refusal to reopen a case  
25 decided prior to Gingles to consider an ability-to-influence claim: "We are aware of no  
26 successful section 2 voting rights claim ever made without a showing that the minority group  
27 was capable of a majority vote in a designated single district . . . [Gingles], which does  
28 nothing more than expressly leave open the question, did not change existing legal standards  
and thus provides no basis for a motion to reopen." Romero v. City of Pomona, 883 F.2d  
1418, 1424 & n.7 (9th Cir. 1989), overruled on other grounds, Townsend v. Holman  
Consulting Corp., 914 F.2d 1136 (9th Cir. 1990).

1 claims that . . . districts merely impair plaintiffs' ability to influence elections. Plaintiffs'  
2 ability to win elections must also be impaired."); Rodriguez, 308 F.Supp.2d at 379 ("Dilution  
3 of the ability to influence representatives is not an injury cognizable under section 2(b) of the  
4 VRA"); Hall v. Virginia, 276 F.Supp.2d 528 (E.D. Va. 2003) (same); Balderas v. Texas, No.  
5 Civ.A. 6:01CV158, 2001 WL 34104836, at \*2 (E.D. Tex. Nov. 29, 2001) (same), aff'd, 536  
6 U.S. 919 (2002); DeBaca v. County of San Diego 794 F. Supp. 990, 996-97 (S.D. Cal. 1992)  
7 (same); Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991) (same); Hastert v. State Bd.  
8 of Elec., 777 F.Supp. 634, 652-54 (N.D. Ill. 1991) (same). But see Armour v. Ohio, 775  
9 F.Supp. 1044, 1052 (N.D. Ohio 1991) (recognizing influence claim);<sup>17</sup> McNeil v. Legislative  
10 Apportionment Com'n of State, 828 A.2d 840, 853-54 (N.J. 2003) (same); Metts II, 363 F.3d  
11 at 12 (leaving open the question of whether influence claims are cognizable).

12 The IRC argues that the Plaintiffs have raised a bare influence dilution claim and it  
13 urges the Court to follow the weight of authority rejecting such claims. The Plaintiffs – for  
14 their part – do not deny that their § 2 claim is based on influence dilution. Rather, they argue  
15 that Rule 8 of the Federal Rules of Civil Procedure necessitates only a short and plain  
16 statement of the claim for relief and that they have done just that. They further contend that  
17 it would be premature to rule on the merits of their claim at this stage because courts  
18 applying that Rule 8 flatly reject the notion that plaintiffs must plead every fact and legal  
19 theory they must prove at trial. This is true as a general rule. See Krieger v. Fadely, 211  
20 F.3d 134, 134 (D.C. Cir. 2000) ("Complaints need not plead law or match facts to every  
21 element of a legal theory). But where a plaintiff pleads with specificity, it is sometimes  
22 possible to plead too much. See Romine v. Acxiom Corp., 296 F.3d 701, 706 (8th Cir. 2002)  
23 ("[W]hile notice pleading does not demand that a complaint expound the facts, a plaintiff  
24 who does so is bound by such exposition.") (quotation omitted). Further, "[d]ismissal [on  
25 a Rule 12(b)(6) motion] can be based on the lack of a cognizable legal theory or the absence  
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27 <sup>17</sup>It should be noted that Armour's recognition of influence dilution claims pre-dated  
28 the Sixth Circuit's decision in Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998).

1 of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police  
2 Dept., 901 F.2d 696, 699 (9th Cir. 1988). Plaintiffs have explicitly raised an influence  
3 dilution claim, and the Court finds that such claims are not cognizable under the VRA.

4 The Court agrees with the majority view that § 2 of the VRA does not provide a  
5 remedy for influence dilution. Section 2 protects the ability of minority groups “to  
6 participate in the political process and to elect representatives of their choice.” 42 U.S.C. §  
7 1973(b) (emphasis added). Although the Gingles Court expressed no opinion on influence  
8 dilution, it also emphasized: “Unless minority voters possess the potential to elect  
9 representatives in the absence of the challenged structure or practice, they cannot claim to  
10 have been injured by that practice.” Gingles, 478 U.S. at 50 n. 17 (emphasis in original); see  
11 also Growe, 507 U.S. at 40 (the first precondition is “needed to establish that the minority  
12 has the potential to elect a representative of its own choice in some single-member district”).  
13 “If a minority population is too small to elect candidates of their choice in a reconfigured  
14 district even with the assistance of reliable [coalition or] crossover voters, then it is the size  
15 of the population and not the voting practice or procedure that is preventing the minority  
16 group from electing representatives of their choice.” Rodriguez, 308 F.Supp.2d at 379.

17 More importantly, influence claims “ha[ve] no standards and would be judicially  
18 unmanageable.” Rodriguez, 308 F.Supp at 379.” ‘Influence’ cannot be clearly defined or  
19 statistically proved” and admits of no limiting principle. Id. As the Seventh Circuit  
20 cautioned in McNeil, 851 F.2d at 947, “[c]ourts might be flooded by the most marginal  
21 section 2 claims if plaintiffs had to show only that an electoral practice or procedure  
22 weakened their ability to influence elections. See also Metts v. Almond, 217 F.Supp.2d 252,  
23 258 (D.R.I. 2002) (observing that there would be no “ascertainable and objective standard  
24 for adjudicating [influence] claims”), vacated by Metts II, 363 F.3d at 12; Hastert, 777  
25 F.Supp. at 652-54 (refusing to open “Pandora’s box” by accepting influence claims); McGhee  
26 v. Granville County, 860 F.2d 110, 116 (4th Cir. 1988) (citing McNeil for proposition that  
27 first Gingles precondition is necessary to prevent the concept of vote dilution from being “an  
28

1 open-ended one subject to no principled means of application"); Illinois Legislative  
2 Redistricting Comm'n v. LaPaille, 786 F.Supp. 704, 715 (N.D. Ill.), aff'd, 506 U.S. 948  
3 (1992) ("The requirement that a minority group be large enough to control a district, not just  
4 'influence' it, enables the courts to adjudicate Voting Rights Act claims with a reasonable  
5 amount of efficiency and consistency.")

6 Even if the Court were inclined to recognize Plaintiffs' influence dilution claim, the  
7 Supreme Court's summary affirmance of Parker v. Ohio, 263 F.Supp.2d 1100 (S.D. Ohio  
8 2003) forecloses that result. In Parker, minority plaintiffs who were not able to form a  
9 majority in a single-member district alleged that the state's redistricting plan diluted their  
10 voting strength because their group was large enough to "influence" the elections in that  
11 district. Id. at 1105. A three-judge district court rejected the claim, stating: "Because  
12 influence claims are not cognizable in our circuit and the plaintiffs have failed to establish  
13 the first Gingles precondition, we see no need to discuss whether or not plaintiffs satisfy the  
14 second and third conditions. The plaintiffs' claim under section 2 of the Voting Rights Act  
15 must fail." Id. The Supreme Court summarily affirmed Parker in November 2003. Parker  
16 v. Ohio, 124 S.Ct. 574, 157 L.Ed.2d 426 (2003). A summary affirmance by the Supreme  
17 Court "binds lower courts, unless subsequent developments suggest otherwise." United States  
18 v. Blaine County, 363 F.3d 897, 904 (9th Cir. 2004) (citing Hicks v. Miranda, 422 U.S. 332,  
19 344-45 (1975)). There have been no doctrinal developments of note since Parker.<sup>18</sup>

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22 <sup>18</sup>To the extent that the First Circuit's opinion in Metts II, 363 F.3d at 12, and the New  
23 Jersey Supreme Court's opinion in McNeil, 828 A.2d 840, 853-54, endorse pure influence-  
24 dilution claims (versus coalition or crossover claims), the Supreme Court's summary  
25 affirmance of Parker calls those holdings into doubt. Those decisions were issued after the  
26 Court affirmed Parker, and they did not address that affirmance. "Although . . . the Supreme  
27 Court is more willing to reconsider its own summary dispositions than it is to revisit its prior  
28 opinions, this principle does not release the lower courts from the binding effect of summary  
affirmances." Blaine County, 363 F.3d 897, 904 (9th Cir. 2004). As the Supreme Court has  
said, lower courts "'had best adhere to the view that if the Court has branded a question as  
unsubstantial, it remains so except when doctrinal developments indicate otherwise.'" Id. (quoting Hicks v. Miranda, 422 U.S. 332, 344 (1975)).

1 Finally, the defense of laches bars Plaintiffs' § 2 challenge to the IRC's 2002 Plan,  
2 whether based on influence dilution or not.<sup>19</sup> Plaintiffs sought to prohibit the IRC and the  
3 Secretary of State from using the 2002 Plan in the 2004 elections. Laches is one of the  
4 affirmative defenses allowed under Rule 8 of the Federal Rules of Civil Procedure and  
5 applies where, as here, the claims presented may be characterized as equitable rather than  
6 legal. See Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1050 (9th Cir.  
7 2000). It is "an equitable limitation on a party's right to bring suit [and rests] on the maxim  
8 that one who seeks the help of a court of equity must not sleep on his rights." Jarrow  
9 Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 836 (9th Cir. 2002) (quotations  
10 omitted). Whether laches bars an action is a discretionary determination to be made by the  
11 court based on the particular facts presented. Apache Survival Coalition v. United States,  
12 21 F.3d 895, 905 (9th Cir. 1994); Coalition for Canyon Preservation v. Bowers, 632 F.2d  
13 774, 779 (9th Cir. 1980). The defense applies to redistricting cases as it does to any other.  
14 See White v. Daniel, 909 F.2d 99, 102-04 (4th Cir. 1999) (precluding untimely § 2 challenge  
15 under doctrine of laches).

16 To determine whether a suit is barred by laches, a court must consider two factors: the  
17 diligence of the party against whom the defense is asserted and the prejudice to the party  
18 asserting the defense. Apache, 21 F.3d at 905; Coalition for Canyon Preservation, 632 F.2d  
19 at 779. "A determination of whether a party exercised unreasonable delay in filing suit  
20 consists of two steps." Jarrow Formulas, Inc., 304 F.3d at 838 (citations omitted). "First,  
21 [the Court] assess[es] the length of the delay, which is measured from the time the plaintiff  
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23 <sup>19</sup>"While Rule 8(c) of the Federal Rules of Civil Procedure provides that laches shall  
24 be set forth as an affirmative defense, where the elements of laches are apparent on the face  
25 of a complaint, it may be asserted on a motion to dismiss for failure to state a claim upon  
26 which relief may be granted." Russell v. Thomas, 129 F. Supp. 605, 605-06 (D.C. Cal.  
27 1955); see also 2 Moore's Federal Practice, § 12.34[4][b] (Matthew Bender ed. 2003)  
28 ("Dismissal under Rule 12(b)(6) may also be appropriate when a successful affirmative  
defense or other bar to relief appears on the face of the complaint, such as the absolute  
immunity of a defendant, claim preclusion, or the statute of limitations.")

1 knew or should have known about its potential cause of action." Id. (citations omitted).  
2 "Second, [the Court] decide[s] whether the plaintiff's delay was reasonable." Id. (citations  
3 omitted). The Court "also consider[s] whether the plaintiff has proffered a legitimate excuse  
4 for its delay." Id. (citing Danjaq, LLC v. Sony Corp., 263 F.3d 942, 954-55 (9th Cir. 2001)).

5 "Unreasonable delay, however, is not enough: 'In addition, laches requires prejudice.'"  
6 Danjaq, 263 F.3d at 954 (quoting Couveau v. American Airlines, Inc., 218 F.3d 1078, 1084  
7 (9th Cir. 2000)). "The very purpose of laches as an equitable doctrine – and the reason that  
8 it differs from a statute of limitations – is that the claim is barred because the plaintiff's delay  
9 occasioned the defendant's prejudice." Id. (citing Telink, Inc. v. United States, 24 F.3d 42,  
10 45 (9th Cir. 1994)). The Ninth Circuit has recognized "two chief forms of prejudice in the  
11 laches context – evidentiary and expectations-based [prejudice]." Id. "Evidentiary prejudice  
12 includes such things as lost, stale, or degraded evidence, or witnesses whose memories have  
13 faded or who have died." Id. (citations omitted). A defendant may demonstrate  
14 expectations-based prejudice "by showing that it took actions or suffered consequences that  
15 it would not have, had the plaintiff brought suit promptly." Id. (citations omitted)

16 The Court finds that Plaintiffs unreasonably delayed raising their § 2 challenge to the  
17 IRC's 2002 Legislative Plan. The IRC finalized the 2002 Plan on August 14, 2002. (First  
18 Am. Compl. ¶ 35.) That Plan "increased the Hispanic voting age of District 14 to 58.11%  
19 from . . . 55.18%," and Plaintiffs do not deny that they were aware of the increase. (Id. ¶ 37.)  
20 Plaintiffs' Superior Court action challenged the 2002 Plan on state law grounds only. (Id. ¶  
21 36); Arizona Minority Coalition for Fair Redistricting, 284 F.Supp.2d at 1246. When the  
22 IRC removed that case to federal court in June 2003, Plaintiffs disavowed any federal claims.  
23 Id. And even in their original Complaint in this action, Plaintiffs made no claim under the  
24 VRA. Although they had ample opportunity to do so earlier, Plaintiffs did not raise a § 2  
25 challenge to the IRC's 2002 Plan until the IRC indicated that it would be contesting federal  
26 jurisdiction. Plaintiffs' § 2 claim is a transparent attempt to gain a federal jurisdictional  
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1 foothold and secure the use of a plan they prefer, and their two year delay in raising that  
2 claim is both inexcusable and unreasonable.<sup>20</sup>

3 The Defendants and the counties and voters of Arizona were prejudiced by the  
4 Plaintiffs' delay. The IRC finalized the 2002 Legislative Plan over two years ago before the  
5 Plaintiffs filed this suit, and the DOJ precleared the Plan over one year before. Arizona's  
6 counties conformed their precincts and readied their election machinery to implement that  
7 Plan. And 2004 election deadlines were on the horizon when this Court issued its Order. In  
8 Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429  
9 F.2d 606, 610 (1970), the Fourth Circuit found injunctive relief unavailable to plaintiffs who  
10 filed a redistricting lawsuit thirteen weeks prior to a filing deadline for candidates for the  
11 state legislature. Similarly, in Simkins v. Gressette, 631 F.2d 287, 296 (4th Cir. 1980), the  
12 court found injunctive relief foreclosed to plaintiffs who waited to bring a redistricting suit  
13 until two days before the opening of the filing period for candidates for the state legislature.  
14 Maryland Citizens and Simkins are relevant to the applicability of laches because here the  
15 courts held that injunctive relief was foreclosed and the availability of injunctive relief  
16 depends on the same general equitable principles as laches. White, 909 F.2d at 103 n.6. In  
17 this case, as in Maryland Citizens and Simkins, Plaintiffs waited until just weeks before  
18 critical election deadlines to file suit. Laches bars their claim.<sup>21</sup>

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20 <sup>20</sup>Plaintiffs assert that they had no need to bring a VRA claim because it was "clear  
21 that the [2002 Plan] was unconstitutional under the Arizona Constitution" and that their state  
22 law claims would preclude the Plan's use. (Pls.' Resp. to IRC's Mot. to Dismiss at 12.) As  
23 the Arizona Court of Appeals' stay ruling shows, those claims have not precluded the use of  
24 the Plan. Plaintiffs have failed to offer a legitimate reason for not bringing their claim  
earlier. The Court can only assume that they did not bring it because they were not sincerely  
concerned for its merits.

25 <sup>21</sup>The IRC also argues that res judicata bars Plaintiffs' § 2 claim because (i) the  
26 Plaintiffs challenged the 2002 Plan in state court, (ii) the Plaintiffs did not raise a § 2 claim  
27 there, (iii) the state court action was terminated by a final judgment on the merits, and (iv)  
28 the parties were the same. (IRC's Mot. to Dismiss at 13.) The Ninth Circuit has held that res  
judicata bars "any lawsuits on any claims that were raised or could have been raised in a prior

1 Even if Plaintiffs' had a viable § 2 challenge to the 2002 Plan, the Court would not  
2 have granted preliminary injunctive relief enjoining the use of that Plan for the 2004  
3 legislative elections. The standard for granting a preliminary injunction in redistricting cases  
4 does not differ from the general preliminary injunction standard. When the public interest  
5 may be affected, that interest must be evaluated and weighed in determining whether to grant  
6 injunctive relief. Southwest Voter Registration Educ. Project, 344 F.3d at 917 ("If the recall  
7 election . . . is enjoined, it is certain that the state of California and its citizens will suffer  
8 material hardship by virtue of the enormous resources already invested in reliance on the  
9 election proceeding on the announced date); Cardona v. Oakland Unified School Dist., 785  
10 F. Supp. 837, 839-40 (N.D. Cal. 1992) ("[In redistricting cases] public interest sometimes  
11 requires that preliminary injunctions against invalid redistricting plans not be issued when,  
12 for example, an upcoming election would be delayed.") As the Supreme Court has noted,  
13 "Under certain circumstances, such as where an impending election is imminent and a State's  
14 election machinery is already in progress, equitable considerations might justify a court in  
15 withholding relief . . . ." Reynolds v. Sims, 377 U.S. 533 (1964). The primary and general

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20 action." Providence Health Plan v. McDowell, 361 F.3d 1243, 1249 (9th Cir. 2004)  
(emphasis in original). But federal law does not apply here. The Full Faith and Credit Act,  
21 28 U.S.C. § 1738, requires federal courts to apply state preclusion law to state court  
22 judgements. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Most  
23 jurisdictions follow a transactional test for determining whether prior litigation precludes a  
24 new claim. See Phoenix Newspapers, Inc. v. Dep't of Corrections of State of Arizona, 934  
25 P.2d 801, 805 (Ariz. Ct. App. 1997) (surveying cases). "If the new claim is closely related  
26 to the first – because it arises out of the same events – it could and should have been asserted  
27 in the first action." Id. But Arizona follows a more restrictive test for determining claim  
28 preclusion: "If no additional evidence is needed to prevail in the second action than that  
needed in the first, then the second action is barred." Id. at 804. On the face of the  
pleadings, it is not clear whether additional evidence would have been required to prove a  
§ 2 violation. At least at this stage of the litigation, the IRC did not meet its burden of proving  
res judicata.

1 elections were quickly approaching, and the public had a significant interest in having those  
2 elections proceed without delay. Preliminary injunctive relief would not have been granted.<sup>22</sup>

### 3 **VII. The Fifteenth Amendment**

4 Almost as a last-minute interjection, Plaintiffs made two off-the-cuff references to the  
5 Fifteenth Amendment in their Amended Complaint. The first occurs in the section entitled  
6 "Jurisdiction and Venue." (First Am. Compl. ¶ 16 ("This lawsuit arises under the Constitution  
7 and laws of the United States, Art. 1, Sec. 2, the Fourteenth Amendment, Sec. 1 and 2, the  
8 Fifteen Amendment . . . .").). The second occurs in the section challenging the 1994  
9 legislative districts. (*Id.* ¶ 58 ("The 1994 Legislative Districts, if allowed to be used in the  
10 2004 legislative elections, would have the effect of diminishing and abridging the voting  
11 strength of Hispanics in violation of . . . the Fifteenth Amendment . . . .").) As discussed in  
12 Section V above, no Article III case or controversy exists with respect to the use of the 1994  
13 legislative districts. Further, the bare mention of the Fifteenth Amendment without more in  
14 the Amended Complaint's "Jurisdiction and Venue" section does not state a claim. Although  
15 Rule 8 of the Federal Rules of Civil Procedure requires only "a short and plain statement of  
16 the claim showing that the pleader is entitled to relief," it still requires at least some  
17 statement. See Fed. R. Civ. P. 8(a); *Cf. Rizzo v. Goode*, 423 U.S. 362, 371-72 (to state a  
18 valid claim for a constitutional violation under § 1983, plaintiffs must allege that they  
19 suffered specific injury as a result of the specific conduct of a defendant). Plaintiffs have not  
20 backed up their purported Fifteenth Amendment claim with any factual allegations, and their  
21 claim fails to meet even Rule 8's liberal notice-pleading requirements.

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24 <sup>22</sup>Moreover, even if the Court found a § 2 violation and decided to grant injunctive  
25 relief, the Court would not dispense with the entire 2002 Legislative Plan. The remedy for  
26 a § 2 violation in a single-member districting scheme is to redraw district lines to create one  
27 or more additional districts in which minority voters are able to exercise electoral control.  
28 See *Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 914-15 (1996);  
*DeGrandy*, 512 U.S. at 1008. The Court would therefore modify only those portions of the  
Plan necessary to remedy the violation.

1 If Plaintiffs intend to base their alleged Fifteenth Amendment claim on the same  
2 factual allegations that support their purported § 2 claim – and it appears that way from the  
3 arguments they made in their briefs – then their claim still fails. Laches bars the claim for  
4 the same reasons it bars Plaintiffs' purported § 2 claim. The IRC adopted the 2002  
5 Legislative Plan in August 2002, and Plaintiffs do not dispute that they knew that the Plan  
6 increased the Hispanic voting age population in Legislative District 14. Yet, Plaintiffs slept  
7 on their alleged rights for over two years and did not bring a federal challenge to the Plan  
8 until the IRC indicated that it would be contesting jurisdiction in this suit. Arizona had  
9 readied its election machinery to implement the 2002 Plan, key election deadlines were  
10 approaching, and the legislative election was only months away. The Defendants, the State,  
11 and the voters of Arizona would have suffered significant prejudice if the Court proceeded  
12 with Plaintiffs' claim and enjoined the Plan.

13 Even if laches did not apply, Plaintiffs' purported Fifteenth Amendment claim fails  
14 to state a claim. The Supreme Court has never held that vote dilution violates the Fifteenth  
15 Amendment. See, e.g., Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 n.3 (2000)  
16 ("W[e] have never held that vote dilution violates the Fifteenth Amendment . . . [and] we  
17 have never even 'suggested' as much.")(internal citations and quotations omitted) (emphasis  
18 added). Nor has it ever found a legislative redistricting plan to run afoul of the Fifteenth  
19 Amendment. See, e.g., Voinovich, 507 U.S. at 159 ("[W]e have never held any legislative  
20 apportionment inconsistent with the Fifteenth Amendment."). Indeed, the majority in Reno  
21 indicated, albeit in dicta, that the Fifteenth Amendment "'applies only to practices that  
22 directly affect access to the ballot.'" Reno, 528 U.S. at 334 n.3 (quoting Mobile v. Bolden,  
23 446 U.S. 55, 65 (1980) (Stevens, J., concurring in judgment)). Plaintiffs do not claim that  
24 they have been denied such access; rather, they allege that the 2002 Plan does not give them  
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1 as much influence as they would like in a single legislative district. Even if Plaintiffs'  
2 Fifteenth Amendment claim were not barred by laches, it is not cognizable.<sup>23</sup>

### 3 CONCLUSION

4 Because this action at its core concerns state constitutional issues and the federal  
5 claims raised have no merit, the Court grants the Arizona Independent Redistricting  
6 Commission's Motion to Dismiss and denies the other pending Motions.

7 Accordingly,

8 **IT IS ORDERED** that Defendant Arizona Independent Redistricting Commission's  
9 Motion to Dismiss [Doc. #32-1] is **GRANTED** and this action is **DISMISSED**.

10 **IT IS FURTHER ORDERED** that Plaintiffs' Request to Convene a Three-Judge  
11 Court Pursuant to 28 U.S.C. § 2284 [Doc. #2-1] is **DENIED**.

12 **IT IS FURTHER ORDERED** that Plaintiffs' Application for Order to Show Cause  
13 [Doc. #3-1] and Application for a Preliminary Injunction [Doc. #5-1] are **DENIED**.

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16 <sup>23</sup>Plaintiffs cite Page v. Bartels, 248 F.3d 175, 193 (3d Cir. 2001) in support of their  
17 purported Fifteenth Amendment claim. In Page, the Third Circuit held that the Supreme  
18 Court's silence on the issue of whether vote dilution may constitute a Fifteenth Amendment  
19 violation did not render the Plaintiffs' Fifteenth Amendment claim insubstantial. Id. at 193  
20 n.12. In that case, the plaintiffs pleaded and argued that the defendants acted with a  
21 discriminatory purpose in seeking to dilute the voting strength of African-American voters.  
22 Id. at 193. Discriminatory purpose is an essential element of a Fifteenth Amendment claim.  
23 City of Mobile v. Bolden, 446 U.S. 55, 62 (1980). The plaintiffs in Page "principally alleged  
24 that [a] discriminatory and dilutive intent [was] obvious from the fact that, under the newly-  
25 adopted plan supported by the Defendants, the percentage of the African-American  
26 population in two of the three existing majority-African-American legislative districts in  
27 Essex County (Districts 27 and 29) would be reduced below fifty per cent, while in the third  
28 (District 28), the African-American majority would be preserved by a mere 1.2%." Page,  
248 F.3d at 193. The court noted: "If Plaintiffs are factually correct, then such purposeful  
action on the part of Defendants may arguably amount to a violation of either the Fourteenth  
or the Fifteenth Amendments." Id. The facts of this case are dramatically different from  
Page. Plaintiffs complain about a mere 3% increase in the Hispanic voting age population  
of District 14 and about an alleged reduction in their "influence" in another legislative district  
as a result. If the Fifteenth Amendment indeed extends to vote dilution, the Court doubts that  
it extends this far.

**IT IS FURTHER ORDERED** that the Motions to Intervene filed by Arizonans for Fair and Legal Redistricting, et al. [Doc. #14-1], City of Lake Havasu [Doc. #23-1], City of Kingman [Doc. #24-1], Mohave County [Doc. #25-1], Bullhead City [Doc. #26-1], County of Santa Cruz [Doc. #27-1], and City of Flagstaff [Doc. #28-1] are **DENIED AS MOOT**.

DATED

4/6/05

Roslyn O. Silver  
United States District Judge